

An official website of the United States government.

Close

We've made some changes to EPA.gov. If the information you are looking for is not here, you may be able to find it on the EPA Web Archive or the January 19, 2017 Web Snapshot.



Overview of the Enforcement Process for Federal Facilities

On this page

- [Overview](#)
- [Discovering Violations](#)
- [Enforcement Response](#)
- [Informal Enforcement](#)
- [Formal Enforcement](#)
- [Service of Process on Federal Departments and Agencies](#)
- [Dispute Resolution Provisions](#)
- [Impact of Fund Availability](#)
- [Community Involvement in Enforcement Actions and Citizen Suits](#)
- [Publicizing Enforcement Actions](#)

Overview

For those statutes in which EPA has a full range of enforcement authorities, EPA's practice is to address violations at federal facilities in the same manner as private facilities. While EPA has broad administrative enforcement authority, it does not have civil judicial enforcement authority to address environmental violations by a federal facility. This limitation stems from the Department of Justice's (DOJ) interpretation of the Unitary Executive Theory, which prohibits one federal agency from suing another agency in federal court. In contrast, the Unitary Executive Theory does not limit nor prohibit state and tribal regulators, as well as citizen groups from suing another agency in federal court.

For those statutes in which EPA's enforcement authority is limited, EPA has developed other procedures to address violations and obtain compliance.

Discovering Violations

EPA may discover or learn of violations by several means. These include:

- Regular reporting required by environmental statutes or regulations
- EPA or State inspections
- Monitoring data
- Notification by the facility of violations discovered as a result of self-monitoring or auditing

Enforcement Response

Generally, EPA bases its enforcement response on the following factors:

- Type of violations
- Potential risk posed by the violations
- Ability of the facility to address the violations

Informal Enforcement

Informal Enforcement activities generally include warning letters or Notices of Violation (NOVs).

Warning Letters

When EPA determines that a violation warrants only an informal notification, the Federal Facility Program Manager (FFPM) or media program staff may issue a warning letter to the facility. Generally, a Warning Letter affords the federal facility an opportunity to correct the identified violation and may avert the need for EPA to use formal enforcement activities.

NOVs

Generally, an NOV requires a federal facility to address an identified violation. An NOV issued to a federal facility is similar to one issued to a private facility and is tailored to address the specific circumstances presented by the situation, the violation, and applicable program-specific requirements.

Formal Enforcement

Once EPA determines that circumstances warrant a formal enforcement action, the extent of enforcement authority granted in the particular statute will generally determine the specific response.

Formal Administrative Options for Statutory Programs With Limited Enforcement Authority

Generally, the Clean Water Act, the Toxic Substances Control Act, the Federal Insecticide, Fungicide and Rodenticide Act, and the Emergency Planning and Community Right-to-Know Act do not confer penalty or order authority upon EPA against federal facilities. Thus, these statutes do not authorize EPA to assess penalties or issue orders. To address noncompliance at federal facilities in these instances, and once a decision is made that the violations merit a formal EPA enforcement response, EPA generally issues a Notice of Non-Compliance (NON or NOV) and negotiates a Federal Facilities Compliance Agreement (FFCA).

NON or NOV

Historically, EPA has used the terms NON and NOV interchangeably at federal facilities to provide notice to a facility that EPA has found violations. An NON or NOV issued to a federal facility under a statute in which EPA does not have penalty or order authority is similar to a complaint issued to a private facility in that it lists alleged violations, but does not include a penalty provision. An NON or NOV issued to a federal facility is tailored to address the specific circumstances presented by the situation, the violation, and applicable program-specific requirements. A NON or NOV generally requests that the facility enter into negotiations for an FFCA.

FFCA

An FFCA is the primary mechanism EPA uses to address violations at federal facilities for statutes under which EPA does not have penalty or order authority. The particular violation(s) at issue determines the specific type, scope, and effect of the FFCA. EPA and the affected facility jointly sign FFCAs, and, at a minimum, it should provide that the violating facility take specified steps to achieve full compliance with the underlying statute.

Formal Administrative Enforcement Options for Statutory Programs With Full Range of Enforcement Authority

Generally, the Resource Conservation and Recovery Act (Subtitle C/Hazardous Waste, Subtitle D/Solid Waste, and Subtitle I/Underground Storage Tanks), the Safe Drinking Water Act, and the Clean Air Act confer penalty or order authority upon EPA against federal facilities. Thus, these statutes authorize EPA to assess penalties or issue orders. To address noncompliance at federal facilities in these instances, and once a decision is made that the violations merit a formal EPA enforcement response, an enforcement action commonly proceeds in one of four ways:

1. Issuance of a field citation or expedited settlement offer with a pre-determined penalty (for those programs such as the underground storage tank (UST) program or the stormwater program)
2. Pre-complaint negotiated settlement
3. Issuance of an administrative compliance order (unilateral or consensual), or
4. Issuance of an administrative complaint

Field Citations and Expedited Settlement Offers

For some programs, EPA uses field citations or expedited settlement offers to address violations quickly. The purpose of these enforcement tools is to supplement, not replace, the traditional administrative enforcement options. These tools offer EPA an opportunity to establish a credible and pervasive field presence. For all violations in which a field citation is not adequate to address the level of noncompliance, the nature of the violator, or the violator declines the offer of settlement, agencies should pursue traditional enforcement actions. The use of these tools must closely follow the appropriate programmatic guidance to ensure that a field citation or expedited settlement offer is appropriate. Guidance includes:

- OSWER Directive 9610.16 (“Guidance for Federal Field Citation Enforcement,” October 6, 1993)
- Expedited Settlement Offer Program for Stormwater (Construction)

Pre-Complaint Negotiated Settlement

Under this approach, EPA attempts to reach a settlement that addresses violations prior to the issuance of a formal administrative complaint pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (CROP)

When a settlement is reached, pursuant to 40 CFR §22.13(b) the case is then simultaneously commenced and concluded by the issuance of a consent agreement and final order (CAFO) (see 40 CFR §22.13(b)(2) and (3)). EPA typically sends a letter describing the alleged violations, and invites the facility owner/operator to engage in pre-filing negotiations in an attempt to resolve the matter. EPA can file an administrative complaint pursuant to 40 CFR §22.14, if the facility owner/operator does not respond to the invitation, or if negotiations fail to result in a settlement.

Issuance of an Administrative Compliance Order (Unilateral or Consensual)

Administrative Compliance Orders (unilateral (UAO) or consensual (AOC)) are another mechanism EPA uses to address noncompliance at federal facilities. Such orders compel compliance with regulatory and statutory requirements.

A typical compliance order will require that the owner/operator come into compliance immediately or within a reasonable, specified period. The specific type, scope, and effect of the administrative compliance order will depend on the specific statutory authority that is available to EPA. Generally,

the federal agency is provided an opportunity to meet with EPA to confer and discuss key issues prior to the order becoming final and effective. At a minimum, all orders should provide that the violating facility take specified steps to achieve full compliance with the underlying statute. As appropriate, the order should provide for further enforcement or stipulated penalties if the facility fails to meet the established schedules for compliance.

Issuance of an Administrative Complaint and Final Order

Several environmental statutes authorize EPA to assess a civil penalty. Each statute sets forth the maximum penalty amount for violations and the statutory criteria for assessing a penalty. Generally, in establishing an appropriate penalty, EPA considers such factors as the economic benefit associated with the violations, the gravity or seriousness of the violations, and prior history of violations.

Administrative complaints are filed pursuant to 40 CFR §22.14, and must include the following:

- A statement reciting the statutory authorization for issuance
- Specific reference to each statutory, regulatory, permit or order provision alleged to have been violated
- Statement of the factual basis for each alleged violation
- Description of all relief sought
- Notice of respondent's right to request a hearing on any material fact, or on appropriateness of any proposed penalty, compliance or corrective action order, or permit action, and
- Instructions for paying penalties

Consistent with 40 CFR §22.15, the respondent has 30 days to file an answer to the complaint and can request a hearing. Hearings are conducted by an Administrative Law Judge (ALJ) consistent with 40 CFR §22.21, and the matter is resolved by an initial decision (40 CFR §22.27) which becomes a final order/final agency action (40 CFR §22.31) unless an appeal is undertaken pursuant to 40 CFR §22.29.

Under the procedures set forth in the CROP, the major steps in the administrative enforcement process are:

- **Complaint preparation and filing stage** - In this stage, EPA prepares and files a formal complaint with the Regional Hearing Clerk (or the Hearing Clerk for cases initiated at EPA Headquarters) and serves a copy on the owner/operator of the facility where the alleged violations arose. The purpose of the complaint is to establish the allegations, propose a penalty (if applicable), and notify the facility owner/operator of its right to a hearing.
- **Pre-hearing stage** - During this stage, the facility owner/operator must answer the complaint (i.e., admit or deny the allegations, and request a hearing). Once the complaint is served, any pre-hearing motions may be made, default orders may be issued (if the owner/operator does not respond), and settlement or pre-hearing conferences may occur. The Chief Administrative Law Judge also offers the parties the opportunity to participate in mediation or alternative dispute resolution at this stage.

- **Settlement** - Settlement of the case may occur at any stage. However, the Agency's preference is that settlement negotiations take place before holding the hearing.
- **Hearing stage** - During the hearing, an EPA Administrative Law Judge (ALJ) will hear the case, examine evidence, and issue an initial decision.

Service of Process on Federal Departments and Agencies

EPA's Consolidated Rules of Practice (40 CFR Part 22) specify how an administrative complaint is to be served on departments and agencies of the United States. 40 CFR section 22.5(b)(1)(ii)(B) states that:

[w]here respondent is an agency of the United States, complainant shall serve that agency as provided by that agency's regulations, or, in the absence of controlling regulation, as otherwise permitted by law. Complainant should also provide a copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii)(A) of this section.

Where a federal department or agency has regulations addressing service of process, the complaint should be served consistent with such regulations and 40 CFR 22.5(b)(1)(ii)(B). If the department or agency has no controlling regulation, serve the complaint on the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations occurred. If the complaint names the Secretary or Administrator of the department or agency, it should also name and be served on the General Counsel/Solicitor General for that department or agency.

Dispute Resolution Provisions

The wide varieties of operations at federal facilities create numerous opportunities for noncompliance with environmental regulations requiring EPA enforcement and compliance activities. In addition, the locations of many federal facilities raise the possibility of tensions with local communities over facility operations. The ability of field-level personnel to effectively and efficiently resolve these matters as they arise is critical to ensuring ongoing federal facility compliance with Executive Order 12088.

One important tool available to assist in the effective resolution of conflicts over compliance with environmental requirements and support collaboration with local communities is the use of alternative dispute resolution (ADR) techniques and approaches. ADR is the use of a neutral third party with no stake in the outcome of the dispute or discussion who facilitates and supports efforts to resolve a dispute and/or reach collaborative outcomes. ADR can take many forms, including convening, facilitation, mediation, consensus building, and allocation, each designed to assist with the specific challenges to reaching agreement faced by parties. Typically, all aspects of ADR are voluntary, including the decision to participate, the type of process used, and the content of any final agreement. It is EPA policy to consider the use of ADR in all matters where its use may benefit the resolution of a dispute or assist in agency activities.

The EPA has staff and other resources dedicated to supporting the effective use of ADR and collaborative problem solving. The [Conflict Prevention and Resolution Center \(CPRC\)](#) provides a wide range of services including consultation, assistance in identifying and access to ADR professionals, provision of neutral services, training in effective use of ADR, and evaluation of ADR processes.

Impact of Fund Availability

E.O. 12088, Federal Compliance with Pollution Control Standards, requires that “the head of each Executive Branch agency shall ensure that sufficient funds for compliance with applicable pollution control standards are requested in the agency budget.” Although most environmental statutes excuse performance when the President has expressly requested an appropriation and Congress has denied the requested appropriation, such situations are extremely rare. Compliance agreements and orders should require that the responsible federal official seek any additional funds necessary to correct violations in accordance with the schedule in the agreement or order.

During negotiations on compliance agreements or orders, there is the expectation that federal officials offer the most expeditious means of funding. However, EPA recognizes that the Anti-Deficiency Act prohibits federal officials from committing funds beyond their authority to spend. Additional appropriations should be necessary only when it has been determined that existing agency funds are either unavailable or inadequate despite cost-savings attempts to address the violations. The federal official signing a compliance agreement or order should have the authority to obligate the funds or make the necessary budget requests to expeditiously correct the violation according to the schedule outlined in the agreement or order.

Community Involvement in Enforcement Actions and Citizen Suits

Community involvement may vary depending on the statute involved, the nature of the violations, and the type of enforcement action sought and initiated. Statutory or regulatory authority may provide for a public hearing or meeting concerning proposed orders or may allow citizens to review and provide comments on proposed plans for achieving compliance. Although some statutes may not specify community involvement as a requirement, EPA encourages and actively seeks community participation in its environmental responsibilities.

Most environmental statutes also authorize citizens to file a lawsuit against any party, including a federal agency for alleged violations of a statute. In addition, most citizen-suit provisions limit actions for violations for which EPA has commenced and is diligently pursuing an enforcement action.

Publicizing Enforcement Actions

It is the policy of EPA to use the publicity of enforcement and compliance assurance activities as a key element of the agency’s program to deter noncompliance with environmental laws and regulations. Actively publicizing these activities on a timely basis informs the public, the media, and the regulated community about EPA’s efforts to promote compliance and deter violations of

environmental law. The objective of a press release is to disseminate pertinent information to the news media. The specific content of press releases is an internal EPA matter at all times and is not an issue for discussion during settlement negotiations. As a public agency, EPA has an obligation to listen and be sensitive to the concerns of any stakeholder or member of the public that its statements be accurate and not create false impressions. However, EPA policy does not permit EPA employees to negotiate, in any way, either the agency's options to issue press releases or their content or wording with parties outside of EPA, including those parties involved in settlements, consent decrees, or the regulatory process.

LAST UPDATED ON MARCH 21, 2016